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Hector L MacQueen and Alan Peacock

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IMPLEMENTING PERFORMING RIGHTS

Hector L MacQueen and Alan Peacock

ABSTRACT

The purpose of this contribution is to move the study of performing rights forward and away from discussion of matters of principle to matters of implementation. Our procedure is to identify the chronological steps which have to be taken by composers or their representatives in ensuring that their property right can be exploited, resulting in payment for performances. At each step we shall attempt to offer observations, based principally but by no means solely on UK experience, on both the economic and legal issues that arise. The first stage in the exploitation of copyright is to create a work in a discernible form. In music this has traditionally taken the form of a score. However, today most popular music will take the form of a taped performance. This is followed by critical discussion of the term of copyright protection and whether a monopoly is created in respect of performing rights. In addition to performing rights, account has also to be taken of performers' rights, raising issues of where copyright protection ends and performers' rights begin. The second stage of exploitation is publication, promotion and performance of the work, a matter so complex that it has necessitated the establishment of collective organisation of authors and publishers to be effective. Policy issues arise about the relations between the members of such organisations *inter se*, and between the organisations and users, and these are illustrated by a number of examples from the history of the British Performing Right Society. Disputes led to the establishment of specialist tribunals in the UK and elsewhere, and there have also been investigations of collecting societies by the British and EC competition authorities. The global market for music means that such issues transcend national frontiers, and there is some discussion of how performing rights are enforced internationally. The paper concludes by identifying a number of major issues: whether or not collecting societies operate against the consumer interest (it is suggested, generally not); the extent to which 'serious' music is or should be subsidised by diversion of the income of the collecting societies in its support; and the possible extension of collective copyright administration into other fields, against the background of ever-increasing cross-border activity in cultural matters generally.

I Introduction

The purpose of this contribution is to move the study of performing rights forward and away from discussion of matters of principle (e.g. should performing rights exist at all and how long should a property right in performance last?) to matters of implementation. This is not to say that matters of principle do not arise in describing and analysing the problems that arise when composers of music or theatrical works go to market armed with the legal protection of their copyright. In fact, it may be argued that experience in implementation has had a marked effect on views about the principles that should apply to the determination and exploitation of such rights.

Two important factors cast their shadow over our analysis. The first is the impressive growth in international trade in both 'live' and 'canned' performances of musical and theatrical works. The second is the rapid transfer of technology between countries which makes it possible to perform a work in one country, simultaneously record it, and copy the recording in another country. Both these factors require clear understandings about the rights of the persons and organizations involved in what may be highly complicated transactions; and these understandings must be capable of being clearly set out in legally enforceable contracts. Clearly, the transaction costs of all parties could be considerably reduced if the countries concerned have similar laws of copyright, a fact recognized in the current discussion of how performing rights should be regulated within the EC, as well as in the establishment in 1886 of the Berne Convention and, very recently, in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which formed part of the GATT Agreement concluded in April 1994.

Our procedure is to identify the (chrono)logical steps which have to be taken by composers or their representatives in ensuring that their property right can be exploited, resulting in payment for performances. At each step we shall attempt to offer observations, based principally but by no means solely on UK experience, on both the economic and legal issues that arise. A final section singles out some of these issues for further discussion.

II Establishing Copyright Protection

The first stage in the exploitation of copyright is to create a work which meets the requirements of copyright - i.e. is an original, literary, dramatic, musical or artistic work - and to put it in a form in which it can be transmitted to its audience. In music this has traditionally taken the form of a score which is printed and distributed by a publisher. A score is a set of instructions to one or more instruments, including voice, which indicate how the composition is meant to sound. However, today most popular music will not appear in sheet form but will take the form of a taped performance. The development of

digital technology has created further complications here, inasmuch as the form in which the record has been made is so easily manipulated, not only by the composer but by others whether or not acting with his or her license, that it may be difficult to identify exactly what the protected work is, or indeed, where the manipulation has altered the essential character of the initial work, and who the author and protected person may be (Frith 1993).

Giving the work a recorded form is important if rights are to be exploited, particularly nowadays when such rights extend to performances not only during the composer's lifetime but for a period of 70 years after death, as will be the case throughout the European Union following the implementation of the Council Directive on the Term of Copyright Protection (93/98/EEC, OJ 1993, L290/9). Currently, post mortem protection in most countries lasts for 50 years, following the minimum period laid down in Article 7 of the Berne Convention, but the Directive increases protection to 70 years. The principle behind this change is not clear, although the need to harmonise terms of copyright protection across the European Union was made clear by Case 341/87 *EMI Electrola GmbH v Patricia Im- und Export* [1989] ECR 79. The choice of 70 years is dictated by the fact that this is the longest period found in the Member States of the Union, namely in Germany; but it is worth noting that this departure from the standard 50-year period came about in 1965 only in consequence of the assumed effect of world war upon copyright enforcement. It was therefore presumably a measure which was originally intended to be of only temporary effect; but now it is to be the law for the whole Union, possibly with retrospective effect.

Economists have tended to appraise protection in terms of efficiency effects. Burrows (1994), for example, considers that this increase is excessive, because it will do nothing to increase the amount or the quality of output. However, as he would admit, an efficiency criterion is not the only way by which such a change in protection may be judged. Clearly the issue of protection is closely related to the view taken about the initial property entitlement of the creative artist or composer. Thus for example the extension to 70 years has been justified on the grounds that the 50-year period was originally intended to benefit two generations of the author's descendants but now that life expectancy is greater a longer period is necessary (see MacQueen 1994 for references). An extreme version of this entitlement would be to argue that, as with physical property, the entitlement exists as long as the asset exists, whoever owns it; and indeed United Kingdom law once took this view of unpublished literary works. We can only conclude that, whereas the efficiency 'rule' could, in principle, be tested by comparing responses to differing lengths of protection, the equity 'rule' cannot. The most one can expect to achieve is a consensus on the principle, but not on its practical manifestation in the form and

length of protection.

It is further argued that control over performing rights confers monopoly power on the owner of the copyright and to extend protection to 70 years is against the interest of those who wish to perform the work. Certainly, the extension of protection may make owners of copyright collectively stronger vis-a-vis consumers, but, if copyright protection is granted universally to composers, authors etc. then, whether or not the quantity of artistic products is affected, competition between members of the same class of beneficiaries still takes place. The confusion seems to arise from the definition of monopoly used. If I write an original composition and have performing rights in it, I am in one sense the 'sole supplier' of that product. In that, restricted, sense I am a monopolist. However, the relevant point from the consumer's point of view is whether or not she can buy alternatives to my own product and, if that is the case, on what terms. The position is unaffected by the conferment of extended post-mortem rights, if these rights are granted equally to competitors. There may be unusual cases where a single composition dominates the market, but this is likely to be temporary, at least in the music market. The fact that performing rights today are normally sold by 'price cartels' representing composers is a separate issue, but even this market imperfection does not preclude non-price competition. (For further analysis see Besen *et al* 1992.)

The practical issue of most importance at this stage is whether the copyright in a musical or theatrical work will hold against challenge from producers or consumers. In the 19th century, when sheet music was the method of publication, composers might detect plagiarism and have recourse to legal action or threaten to take such action. A famous case was that of Sir Arthur Sullivan whose opera *Mikado* contained a song 'When a Merry Maiden Marries'. The first bars of the song bear a close resemblance to the refrain of a well-known popular song of the time - 'Love's Old Sweet Song' - and its composer Molloy threatened legal action. Sullivan's defence was that he had never heard the song - which seems astonishing in itself - and that, in any case, there were only seven notes in the scale!

This example also points up the problem as to what constitutes an 'original' work. In most legal systems within the Berne Union originality is a threshold test which a work must pass before copyright in it can be claimed. In the Anglo-American or Common Law legal world, originality has traditionally been taken to mean simply that the form of expression of the work in question is not derived from that of any other work but is simply the product of the author's own skill and labour. However, a work may be derivative yet have copyright because the second author has found a different way of expressing the same idea or information as the first. In a saying familiar to copyright lawyers, there is no copyright in ideas. In music the cross-over from the inspiration of a predecessor's ideas

to the use of a prohibited form of expression may be particularly difficult to determine. In the Civil Law tradition, however, originality has been seen as setting a somewhat higher goal of intellectual achievement than mere skill and labour, although there too the ideas/expression dichotomy is firmly established. Of late there have been signs in the Common Law world that the courts are beginning to interpret originality more strictly: thus it has been observed that there is much skill and labour in tracing a drawing but that would still not be enough to give the tracing copyright (*Interlego v Tyco Industries* [1989] AC 217), while the US Supreme Court has denied copyright to a telephone directory on the grounds that while there was clearly 'sweat of the brow' in its compilation, listing subscribers' names in alphabetical order together with addresses and phone numbers lacked the necessary creative spark for copyright (*Feist Publications Inc v Rural Telephone Service Company Inc* 113 L Ed 2d 358 (1991)). Equally the Civil Law concept of originality is being modified to meet the demand for copyright in works such as computer programs and databases.

For music, the most difficult issues have arisen in relation to new arrangements of existing works and, in the field of popular music, digital sampling and the so-called 'hooks' around which most tunes in the field are based (Frith 1991; Bently 1989). The UK Copyright Act of 1988 poses particular difficulties in this area, because it says that the owner of the copyright has the right to stop 'adaptations' of his work; and in the context of music this is said specifically to include any arrangement or transcription of the work. The extent to which the arranger's activities are legitimate at all unless licensed by the copyright owner is therefore far from clear. It should be noted, however, that the arranger may still have his own copyright in his work. The same is true even when the work that has been arranged is out of copyright. The UK Performing Right Society operates a tariff for the performance of such works which is obviously founded on the view that the requirement of originality is satisfied; indeed the rates vary according to the degree of originality involved (PRS 1991: 45-49). But it is the policy of the PRS and some other collecting societies not to give any royalty to the arranger of a copyright work, although it is the practice of some continental organisations to do so (PRS 1991: 44-45).

A final point which should be made is to distinguish performing rights from those of the performers themselves. Performers' rights have been gaining international recognition since the Rome Convention 1961 and are included in Article 14 of the recent TRIPS Agreement. The essence of the performer's right is however the control of fixation of his performance - that is, recording it - rather than over subsequent performances, either of the recording (so long as it was duly authorised in the first place), or by other performers imitating the style or interpretation of the first performer. In the European Union, however, performers' rights have been extended under the Rental Right Directive

of 1992 (92/100/EEC, OJ 1992, L346/61) to include rights to authorise or prohibit reproductions, broadcasts, distribution and rental of fixations of performances; a virtually copyright-like bundle, the practical implications of which for the recording and broadcasting industries are as yet unclear. In addition, while the performer's rental right may be transferred to film or record producers, the performer retains an unwaivable right to an equitable remuneration.

There are at least two supplementary issues arising from the increasing recognition and scope of performers' rights outlined in the previous paragraph. First, style or interpretation *per se* seem to lie beyond the scope of both performers' and copyright protection at first sight, since these belong more in the realm of ideas than expression; but there is perhaps room for debate, especially in the realm of music composed and recorded without a score, where the performance may also be said to be at least part of the act of creation. A parallel may perhaps be drawn with English cases recognising that a historical writer has a copyright in his interpretation of the event usually called the Charge of the Light Brigade, so that the well-known playwright John Osborne, who used the book as a source in writing a screenplay for a film about the Charge, required the writer's licence (*Harman Pictures NV v Osborne* [1967] 1 WLR 723). Secondly, in the United States the courts have held that performers may protect themselves against imitations of their distinctive vocal styles in what is effectively a tort of appropriation of personality (see *Midler v Ford Motor Co Inc* 849 F 2d 460 (9th Cir, 1988; Gaines 1993). Particularly in popular music the performer's style may be much more significant to the identification of the work in the public mind than any other element. It is not clear to what extent the *Midler* decision would be applied in the UK. In the 1950s the actor Alastair Sim was held unable to prevent the imitation of his distinctive tones in an advertisement for baked beans (*Sim v H J Heinz & Co Ltd* [1959] 1 WLR 313), but it is now widely thought that this decision was wrong (see MacQueen 1993: para 1397). Performers' rights may therefore still develop further in significance, and complicate still more the difficulty in establishing who has rights in relation to subsequent performances of a work.

III Publication and Promotion

Mozart, as well as writing his own compositions, played them himself, alone or in collaboration with a small orchestra, advertised the concerts at which the compositions would be played, and even collected the subscriptions to them. Although his works were published, often with considerable revision after first performance, expectation of royalties from other performances and from purchase of sheet music, were low. The 'shelf life' of compositions was so short that by Mozart's time Bach and Handel's music could

only be heard in Vienna in rare and highly subsidized performances. Conditions were not dissimilar in late-nineteenth and early-twentieth-century Britain before the passage of the Copyright Act 1911: composers and music publishers still drove hard and complex bargains over score publication and concert performances, and in these negotiations composers were seldom the winners (see e.g. Rees 1986: 246-51). A post-mortem performing right of 70 years would probably have been regarded as a sick joke.

The exploitation of performing and neighbouring rights (such as rights in recordings and broadcasting relays) is a much more complicated process today and would entail negotiation of payments with a wide variety of persons and organizations which make the 'transaction costs' to the composer, acting on his own account, prohibitive. Additionally, particularly in the world of pop music, competition in a market of rapidly changing tastes makes returns uncertain, as reflected in the large variations in returns. Composers therefore have to find persons with special skills in marketing their work and who are also willing to share the risks. Before World War II, it was common for publishers of 'serious' music to take a long view of the prospects of young composers and to pay them regular advances in anticipation of eventual success, relying on cross-subsidization from the profits from sales of sheet music and marketing of works for performance in the established repertoire. The composer in turn would sign an agreement to offer exclusive rights to the publisher for his works and often agreed to perform other tasks for him, such as the arrangement and editing of works already in the public domain (see Roth, 1969). Gone are the days when a publisher might eventually hit the jackpot through the publication of a score - the initial printing of the English vocal score alone of Leon Cavallo's *Pagliacci* was no less than 5,000 copies, while in 1899 Scott Joplin's *Maple Leaf Rag* sold a million copies. Today, in the case of serious music, no reliance is placed on the sale of the score. Those who achieve performances do so usually because conductors or music ensembles have been supplied with a tape recording of the work and income is generated through live performances, coupled with records and broadcasts, and the orchestral or instrumental parts are hired from the publisher.

Something of a throwback to the early days of music performance is to be witnessed in the music of pop groups who develop a compositional style and physical presentation which, it is hoped, will differentiate their product. The 'publisher' is more likely to be a recording company, which selects groups on the evidence of talent-spotting and demonstration discs, and grooms them for stardom. An agreement will be entered into with the group and/or its agent that requires control over their performances, recordings and even over the development of their style. As was the case with composers in the nineteenth century, recording companies have large numbers of such agreements (their 'artists roster'), most of which will not lead on to commercial success; but those

which do will subsidise the provision of opportunities for a much larger number than would otherwise be the case (Trebilcock 1976; Monopolies and Mergers Commission 1994: 7, 92-97).

It is not difficult to predict where contractual difficulties will arise in cases of this sort. Investment in human capital does not enable the investor to acquire the asset in order to put it to some more productive use if the asset does not 'perform', including selling it on. This is why something like an 'indenture' system is favoured by the investor, that rights are required over the product of the asset or an agreed period of time, although anti-slavery laws should prevent the investor from not allowing the 'investee' to buy out the contract. The frequent objection to such contracts is that they may be entered into by the 'investee' without a clear knowledge of their implications. On the other hand, the investor, in this case the publisher or record company, will reasonably insist that the risks attached to the exploitation of the asset should preclude others from receiving an uncovenanted benefit from the investment (see Monopolies and Mergers Commission 1994 97-100 for the typical contents of such contracts).

There have been numerous examples in the British courts of recording artists challenging the validity of their contracts with the recording companies, generally with some success. Examples include Fleetwood Mac, Gilbert O'Sullivan, Elton John and Holly Johnson (see *Schroeder v Macaulay* [1974] 1 WLR 1308; *Clifford Davis v WEA Records* [1975] 1 WLR 61; *O'Sullivan v Management Agency* [1985] QB 428; *Elton John v Richard Leon James* [1991] FSR 357; Garnett 1990). In the latest case, however, George Michael's challenge to his contract with Sony on the grounds of restraint of trade and contravention of Article 85 of the Treaty of Rome was thrown out by Mr Justice Jonathan Parker (*The Times*, 30 June 1994; Michael has now lodged an appeal). Key factors were that the contract in question had replaced an earlier one between the parties; George Michael had had expert legal assistance throughout the negotiations; he had affirmed the agreement in 1990 even though he was then aware that it might possibly be in restraint of trade; and the restraint did not affect trade between member states of the EC. The first three of these factors had not been present in any of the earlier cases, where it was clear that the recording companies and managers making the contracts had not always ensured that young and inexperienced persons were being well or independently advised; on the other hand, these earlier cases have been convincingly criticised as denying the recording companies the capacity to generate income which could then be applied to extending the numbers of persons being given the opportunity to record (Trebilcock 1976).

IV 'Giving Music its Due'

As a matter of fact (as opposed to law), even in those countries where copyright operates

effectively, the creator of a work to be performed cannot prevent the work being performed so that the composer may be able to exercise control over the nature of the performance, though some protect '*le droit moral*' of integrity. The major problem for the composer and publisher is to identify when performance is taking place so as to be able to collect a royalty. The further problem is to negotiate what that royalty should be. Clearly, the opportunity costs to the individual composer and publisher of trying single-handed to identify the occasions on which a royalty may be due and to negotiate the amount of payment is very high.

The problem is sometimes solved in other sectors of the economy by creating the condition where those who wish to perform the work are forced into revealing when and where performance will take place and how much they are prepared to pay. This is possible if circumstances allow the producers of the product or service to merge, so as to reduce the range of alternative sources of supply, always subject to anti-monopoly legislation. While there are instances in which musical composition is produced by combined action, merger virtually renders the composer anonymous. This may be counter to the composer's own aspirations to be separately identified as the creator of a work and it may also have the material disadvantage of not differentiating her product as distinctive and original. Consequently, composers have confined their collective action, in respect of collection of royalties, to setting up of co-operatives designed to exploit their individual rights.

A full description of the evolution of such co-operatives is beyond the scope of this article (for histories of the UK developments, see Peacock and Weir (1975), McFarlane (1980) and Ehrlich (1989)). In the United Kingdom, the two major collecting societies dealing with performing rights are the Performing Right Society (dealing with the copyrights of composers, lyricists and publishers) and Phonographic Performance Ltd (dealing with the copyright also enjoyed by the makers of sound recordings). British practice may be taken as fairly typical of the activities of such organizations:

- (a) Composers and publishers assign their copyrights to the organisation. This transfers ownership and is not a mere licence to the organisation to enforce the performing right. At least in the UK there might otherwise be difficulty for the organisation in raising court actions in respect of infringing performances in its own name (McFarlane 1980: 97-98).
- (b) The organisation negotiates royalty payments for composers collectively and distributes receipts amongst them broadly according to the use made of individual composers' works.
- (c) It identifies the various classes of user in negotiating royalties, with the

result that there are over forty separate tariffs. These cover public performance, including pubs (juke boxes), discotheques, cinemas and airlines, BBC and independent radio and television broadcasting and latterly cable and satellite stations.

- (d) Typically it grants a blanket licence to a class of user who can then 'perform' any item in the PRS repertoire.
- (e) It has a policing system (a team of inspectors) to safeguard against unlawful use of copyright music. (Punch-ups have been known to take place in pubs where inspectors have discovered that tenants do not hold a juke box licence.)
- (f) In order to ensure equitable division of royalties as well as to collect data relevant to tariff negotiations, it monitors performance programmes extensively. For example, broadcasting stations send complete returns of all music used and the PRS monitors broadcasting programmes on a sampling basis as a check on the accuracy of returns. Administrative expenses are therefore not a negligible item of PRS expenditure (they equalled about 17.5% of total revenue in 1993 (PRS Yearbook 1994-95: 10, 12)) and will vary considerably as between particular classes of user.
- (g) It acts as a collecting agency for overseas-based composers, with an international link-up with similar societies in other countries which collect royalties for British-based composers.
- (h) Typically, it negotiates with groups of users, and not with individuals, and some of these groups are powerful and well organised.

There are large economies of scale attached to the collection of royalties resulting in the establishment of a technical monopoly. Even if it is not the intention to exploit this power by preventing competition in the collection business, from the policy point of view, it is considered undesirable to have a situation where it is not in anyone's interest to set up in competition and where many music-users face a single collecting organization.

The 'monopsony power' puts the composer and publisher in the position of only being able to influence royalty collection through their own membership or through representatives on the governing committees. Only the United States amongst the major copyright countries has more than one collecting society in the field of performing rights, and even that is the result of a dispute between the original society (ASCAP) and its principal clients, the radio stations, in the 1930s (McFarlane 1980: 164-5). In 1919 a substantial group of music publishers withdrew from the UK Performing Right Society in order, as they hoped, to 'exploit the new craze for dance music by publishing sheet music

for the new works ... They believed .. that sales of sheet music would continue to provide a sufficient return for the publisher, and that free permission for performance compensated for the loss of performing right royalties by the value of the advertisement acquired' (McFarlane 1980: 99). By 1926 the publishers concerned had re-joined the PRS, the development of radio broadcasting in 1922 having shown that the future lay with performing rights rather than sheet music. Some music publishers specialising in educational and sacred music managed to resist joining the PRS in the beginning, relying on income from sheet sales and concert promotion, and arguing that the purpose of publishing music was to ensure performance. The leading company in the field, Novellos, succumbed in 1936, however, recognising that changes in the use of music, particularly in films, and the expansion of the international markets to which PRS gave access, had made it impossible to earn a commercial return through individual negotiations (McFarlane 1980: 145).

As one might expect, the interests of composers may differ amongst themselves and from those of publishers and collecting agency staff. Indeed it has been argued in Germany that there is inconsistency in allowing both composers and publishers to be members of the same collecting organisation (Beier *et al* 1989: 141). A common source of disagreement is qualification for full membership of the co-operative which will determine the voting strength of those who elect members who act as the equivalent of directors of a company. Like any cartelised arrangement, an element of instability is introduced into the decision-making process reflecting these differing interests. The PRS has recently completed a Corporate Governance review, in the formulation of and response to which some of these tensions were again apparent (*PRS News*, Issue No 41, Autumn 1994, 6-8). The fact remains that collecting agencies are comparatively free from major upheavals in organisation. Members have only to think of the transaction costs they would inevitably have to face if they were to go it alone.

It is relations with users that have brought policy issues to the fore. As early as 1922 the PRS was unsuccessfully challenged in a Scottish court as an illegal combination in restraint of trade (*PRS v Edinburgh Magistrates* 1922 SC 165). This was rejected on the grounds that the Society existed to enforce its members' rights and not to impose restrictive conditions on the conduct of their business. The scenario of a monopoly confronting large numbers of users in a weak bargaining position is something of a myth. Countervailing power developed very early in the evolution of performing right enforcement. It arose incidentally in the case of broadcasting companies relaying concerts 'live' or using tapes of musical compositions in copyright. For example, in the UK, by as early as 1930 the BBC, then a broadcasting monopoly, provided no less than 35% of the revenue of the Performing Right Society, and this percentage has never fallen to less than

25% in the ensuing years when revenue from other sources, notably from abroad, has risen rapidly. In 1993, the latest year for which figures are available, broadcasting accounted for over £50 million or 32% of the PRS revenue for the year (PRS Yearbook 1994-95: 10, 11, 13). Recognition of the PRS by the infant BBC in 1923 was a major step in the Society's advance; without this, progress would have been much slower and more costly. Deliberate use of the countervailing power of users has taken the form of co-operation between orchestras, concert agencies and cinema chains in order to strengthen their arm in negotiating tariffs. As early as 1919 an organisation called initially the British Music Union Ltd and later the International Council of Music Users provided organised opposition to PRS tariffs which in 1929-1930 got as far as a parliamentary bill - ultimately defeated - designed to fix performing right rates at ridiculously low rates (McFarlane 1980: 115-17; Rees 1986: 257-61).

The likelihood of major disputes between the PRS and major users following the Society's post-war revision of its tariffs to take account of inflation, along with the emergence of Phonographic Performances Ltd as a collecting society in respect of the public performance of sound recordings, led to the setting up of the Performing Right Tribunal under the Copyright Act 1956 (McFarlane 1980: 131-6, 166-72). This was an official body with the task of resolving disputes when no agreement could be reached between the contracting parties. There are parallel institutions in many other countries (Freegard 1994). The Performing Right Tribunal played an important role in disputes between the PRS and broadcasting companies in 1967 and 1972. But it may be indicative of the widespread acceptance of the performing right that there were comparatively few other cases before the Tribunal in the 20-plus years of its existence, and most of these were rate-fixing exercises in which the Tribunal employed the judicial techniques of Solomon in determining figures between one side's price and the amount the other was willing to pay (McFarlane 1980: 177; Cornish 1989: 331). Some cases did deal with issues of the societies' market power, however: so the PRS was not allowed to give discounts to users dependent upon membership of particular trade associations, or to charge royalties for activities not restricted by copyright, since neither of these protected legitimate interests of the society (Cornish 1989: 331-2). The Performing Right Tribunal has become the Copyright Tribunal under the 1988 Act, with an extended jurisdiction reflecting the growth of collective copyright administration into fields other than performing rights (see further below, Part VI). Reported cases from the Tribunal to date suggest that like its predecessor its main role is to act as a fixer of rates: in *British Amusement Catering Trades Association v PPL* [1992] RPC 149 in respect of multiple operators of juke-boxes; in *Working Men's Club and Institute Union Ltd v PRS* [1992] RPC 227 in respect of non-profit-making members' clubs; in *British Phonographic Industries v Mechanical*

Copyright Protection Society [1993] EMLR 86 a royalty rate of 8.25% of the published price to dealers was fixed as due from recording companies to composers for the right to record a work (see further Frith 1993: 9-11, 17); and in *Association of Independent Radio Contractors Ltd v PPL* [1994] RPC 143 in respect of the independent radio broadcasting of records. There has also been a major case not concerned with performing rights, but about the royalties to be paid by newspaper publishers for advance weekly TV and radio programme schedules - again essentially a matter of fixing a reasonable rate (*News Group Newspapers Ltd v Independent Television Publications Ltd* [1993] RPC 173).

In 1988 the Monopolies and Mergers Commission carried out an investigation of the licensing policies of the second main collecting society, Phonographic Performances Ltd. This was stimulated by another dispute with broadcasting organisations over 'needletime' (the amount of time which could be given to the broadcasting of records as opposed to playing live music, usually expressed in hours per day). PPL's policy was to restrict 'needletime', in order to encourage the employment of live musicians. This had already been recognised as a legitimate interest by the Performing Right Tribunal (Cornish 1989: 332). Although the Commission was generally supportive of collecting societies, its disapproval of this policy led ultimately to provisions in the Broadcasting Act 1990 enabling a broadcaster to have unlimited needletime so long as certain conditions are met. The new Copyright Tribunal adjudicates on royalty and other disputes arising in consequence.

The major legal issue between the PRS and users has lain in defining the scope of the performing right in law. Performance was (and is) defined in terms of both live and 'canned' presentations, so that there can be performance in the playing of a sound recording or film, or the transmission of a broadcast. The limits remain unclear: it has been said that if the statutory definitions were read literally, you might infringe the copyright in a concert programme by playing the works listed therein. Only performances *in public* infringe the right. Between the two World Wars the PRS engaged in regular litigation on this point, and succeeded in establishing that a wide range of locations were 'in public' for this purpose. There was little problem with theatres and concert halls; but there were also cases about hotel lounges, restaurants, members' clubs, the Womens Rural Institute and factories (the last being in respect of the BBC programme 'Music While You Work', which was played in workplaces throughout the country) (McFarlane 1980: 103-10, 119-26). The essence of the matter seems to be the existence of an audience other than the performer(s), for whose benefit or pleasure the performance is made, and the members of which in some sense are part of the public to whom the work is directed. Payment by the audience is unimportant. So in the leading Scottish case the fact that the audience consisted of only the members of a club (the Rangers Football Club

Supporters Club, Greenock), who did not pay for admission to the performance, did not prevent them being part of the audience at which the composer in question had aimed his work; accordingly there was performance in public and, in the absence of a licence, infringement (*PRS v Glasgow Rangers FC Supporters Club, Greenock* 1974 SC 49). There has been much less PRS-led litigation since 1945, again indicative of the widespread acceptance of performing rights; the main cases have concerned the ‘piping’ of music in record shops which, it has been established, may be regarded as a public performance (*PRS v Harlequin Record Shops Ltd* [1979] 1 WLR 851). It will be interesting to see whether there are any cases in the UK to parallel recent decisions in Germany that performances and ‘piped’ music in prisons are not subject to royalties (*Re Piped Music in Prisons* [1993] FSR 575) and in Australia that the playing of music on a telephone ‘hold’ system is not a public performance (*Australasian PRS Ltd v Telstra Corp Ltd* [1994] RPC 299).

V Performing Rights in an International Context

Copyright has an international framework under the Berne Convention of 1886 as several times revised (most recently in 1971). This has two main aims: one the establishment of certain minimum standards of copyright law in member countries, and the other enabling nationals of member countries to receive national treatment in all other member countries. Berne now having a very substantial membership, the result of its Article 11 is that the performing right which is good in one Berne state is good in much of the rest of the world, although it may be noted that different cultures may still offer contrasting perspectives on the precise significance of this (see e.g., on the history of copyright in Japan, Mitsui 1993). But for the individual composer this simply increases many-fold and even further beyond the bounds of practicability the problems of enforcement and the conversion of rights into royalties. The problem is overcome by the extension of the scope of the collecting society to the international stage. In general each of the copyright countries has its own collecting society in respect of the performing right in music, and there are close connections between the various national societies which ensure that the rights of their members are recognised as universally as possible. Essentially the national societies are affiliated under the aegis of the International Confederation of Societies of Authors and Composers (CISAM); each grants licences and collects royalties in its own country in respect of its own and the repertoires of each affiliated society. There are similar establishments in respect of the performance of sound recordings, but these are less effective because the international recognition of neighbouring rights is less developed through being subject only to the Rome Convention of 1961, which has not been as successful as Berne in attracting members and setting detailed standards of protection.

But this is being overcome, in particular through the pressure exerted by the conclusion of TRIPS under the Uruguay Round of GATT. This commits GATT countries to a strong protection of sound recordings in future.

Some idea of the importance of foreign revenues to composers can be gleaned from the annual reports of the PRS. In 1993 some £48 million of the Society's income came from overseas, representing about 34% of its total revenue (PRS Yearbook 1994-95: 10, 11, 15-16). £27.95 million came from Western Europe, £12.8 million from North America and £5.16 million from Asia and Australasia (ibid: 15). Going in the other direction, PRS allocated £25.5 million to affiliated societies in other countries, by far the largest part (nearly £19 million) going to two of the three US collecting societies (ibid: 16).

These cross-border arrangements have attracted the attention of the European authorities in the context of the push towards a single market. In Case 395/87 *Ministere Public v Tournier* [1989] ECR 2521, the Court of Justice considered the application of Article 85 of the Treaty of Rome to the agreements between the various national collecting societies. The practice of each society was to refuse access to their repertoires by users established in other member states. It was held that the agreements did not in themselves infringe Article 85(1), but the systematic refusal of access to foreigners was a concerted practice which might affect trade between member states unless it could be explained by the need of national societies to set up their own systems of management and control in foreign territories if direct access were allowed as proposed.

An earlier decision of the European Commission on the rules of the German collecting society Gesellschaft für musikalische Aufführungsrechte und mechanische Vervielfältigungsrechte (GEMA) also examined some of the restrictions which supported international relationships of the societies in general. One rule which was disapproved provided that a collecting society could only have its own nationals as members. Given that each collecting society enjoyed a national monopoly, the rule restrained competition by denying to members the ability to seek a better deal or express dissatisfaction by joining another society (*Re GEMA* [1971] CMLR D35). There appears now to be no requirement in the PRS rules that a member must be a UK national; but in practice convenience and, presumably, costs mean that composers and publishers tend still to belong to their national organisation and, given the international arrangements which have been made, there is no need to join more than one.

The ability of the national organisations to charge performing royalties in respect of sound recordings has been affected by the Community rules on free movement of goods. Under Community law, once a sound recording has been put on the market with the consent of the copyright owner anywhere within what is now the Union, the copyright owner cannot use copyright to prevent import of that recording into another member

state. His right to be first to market is said to be ‘exhausted’. This principle was applied against GEMA in a case before the Court of Justice where that organisation sought to impose a charge upon imports from the UK equivalent to the difference between the statutory royalty of 8% paid to German composers and the 6.25% then standard in Britain (Joined Cases 55, 57/80, *Musik-Vertrieb Membran GmbH v GEMA* [1981] ECR 147). But later the Court upheld a ‘supplementary mechanical reproduction fee’ charged by the French organisation SACEM upon imported sound recordings on the basis that it was in substance a performing royalty which was unaffected by the free movement of goods principle (Case 402/85, *Basset v SACEM* [1987] ECR 1747). A similar point arose in the *Tournier* case, where the legitimacy of charging performing royalties in respect of imported records being played at a French disco was affirmed.

VI Issues raised by the implementation of performing rights

We conclude by listing and commenting on a number of issues that arise from this discussion of the implementation of performing rights:

(i) Consumer welfare

There is a common presumption that a price cartel, while it does not prevent non-price competition, operates against the consumer interest because the consumer is denied a choice between outputs provided at a range of prices. Furthermore if the cartel is in effect a natural monopoly, given the assignment of rights of composers and writers to a collecting society, then competitive forces are not strong enough to influence administrative costs. Therefore, it may be held, collecting societies which are natural monopolies will be both allocatively and technically inefficient.

The first branch of this argument rests on the assumption that the only choice open to those paying performing rights is between different suppliers of music who are members of the same collecting agency. From the point of view of, say, orchestral management, this is correct; but the ‘final buyer’ in the process of musical production is the orchestra’s concert audience. They at least can listen to a composer’s work on disc or video, on a home record player or VDU, or through radio and TV transmission. At least the cartelisation of rights is not exclusive to one collecting agency associated only with live performance. The second branch implies that collective agencies, being technical monopolies, may operate outside some ‘efficiency frontier’. This suggests reference to empirical investigation but, as is clear from the literature (see e.g. Button and Weyman-Jones 1994), satisfactory tests run into all sorts of problems. In our case one would need to adopt some form of international comparison of administrative costs of collecting agencies, but a uniform application of definitions of such costs and

standardising for different forms and levels of output present formidable difficulties.

The defence of the collecting agencies will be that anyone in a position to contest their market is free to do so, that 'individualised monitoring of performances' would raise the industry average cost curve well above that of any collective agency in a position to take advantage of economies of scale, and that any complaints about anti-competitive activities may be taken care of by government legislation aimed at removing restrictive practices. At the very least, from the consumers' point of view present methods of collection, monitored by a suitable legal regime, is the better of two imperfect alternatives; and we are inclined to agree.

(ii) *Externalities*

At one time, it was common to argue that 'serious' composers conferred 'uncovenanted benefits' not only on other composers but on the community at large. The arguments are well-known. 'Serious composers' enhance our international cultural prestige. As musical innovators, they develop new musical forms and exploit new sound patterns and new instruments such as electronic devices. These innovations 'filter through' to the other members of the profession and help the development of light and 'pop' music. Sixty years ago Constant Lambert argued in characteristic fashion:

The sudden post-war efflorescence of jazz was due largely to the adoption of raw material of the harmonic richness and orchestral subtlety of the Debussy-Delius period of highbrow music ... The harmonic background drawn from the impressionistic school opened up a new world of sound to the jazz composer, and although the more grotesque orchestral timbres, the brute complaints of the saxophone, the vicious spurts from the muted brass, may seem to belie the rich sentimentality of their background, they are only thorns protecting a fleshy cactus ... a *sauce piquante* poured over a nice juicy steak. (Lambert 1948: 149-50)

There is something more than token public recognition of the community benefit in the allocation of public subsidies to the arts which are devoted to the encouragement of new serious music, and the encouragement of new music by the BBC and other public broadcasting companies. Although one can appreciate the many complaints by serious composers about the inadequacy of such funding and support, it is not relevant to our discussion to consider this issue. What is relevant is that 'pop' composers claim that they are equally innovative and are just as important if not more important elements in 'international prestige', but do not press for government funding other than, perhaps, the subsidisation of their musical education. It follows that it is an open question whether or

not Constant Lambert's point is still relevant, given the considerable inter-action between 'serious' and 'pop' music. Our impression is that collecting agencies no longer 'cross-subsidise' serious composers to the extent that they used to.

(iii) *Extension of collective copyright administration*

The collective administration of performing rights developed very largely in response to technological developments which transformed the way in which performances might be delivered to the public. Composers were also quick to form a collective response to the capacity to reproduce via sound recording; the Mechanical Copyright Protection Society, which administers fixation rights, was founded in 1924. A similar story is now occurring now with other aspects of copyright, notably the reproduction right. Modern technology has facilitated copying in both the commercial and the domestic worlds, whether through the medium of the photocopier, the computer or the double-headed audio and video recorder. For many copyright owners nowadays the position is rather similar to that of composers and publishers of music in the early twentieth century: how, in the face of widespread copying, to identify when one's work is being copied in a way for which a royalty should be paid? There have been two aspects to the response: one the collectivisation of copyright owners in respect of their rights, the second amendment of copyright and other laws in ways which facilitate the collective enforcement of royalties or some equivalent. In Britain photocopying was a major issue on which the law was uncertain until 1988; while the copying was undoubtedly a *prima facie* infringement, some of it might have been exempted under the fair dealing provisions of the legislation if carried out for purposes of private study, research, criticism or review. The 1988 Act sought to restrict the use of reprography in educational establishments within very narrowly defined limits, but provides that where a relevant licensing scheme was in place this restriction no longer applies. This has greatly assisted the work of the Copyright Licensing Agency, a collecting society founded in the early 1980s representing authors and publishers which grants blanket licences to educational establishments (McFarlane 1989: 152-53; Flint 1990: 159). Once again disputes about CLA licence terms and royalties fall within the jurisdiction of the Copyright Tribunal.

Another example of the modification of the law which has facilitated collective action by copyright owners is the introduction of rental right. This right currently applies to sound recordings, videos and computer programs, and is partly designed to ensure a return in respect of home copying of such works as well as what is effectively a private performing right. The commercial outlets through which such works are hired to consumers are thus required to pay royalties to the producers which are no doubt reflected in the prices paid by the consumer; which may therefore in turn be seen as

including some sort of indirect royalty to the copyright owner. This gives producers strong control over what was a new form of market for their works, and under the Rental Right Directive of 1992 (92/100/EEC: OJ 1992, L346/61) it is being extended beyond the neighbouring rights to works of authorship and, as noted above (000-0), to performers' rights. Article 4 of the Directive specifically recognises that the unwaivable right of equitable remuneration conferred upon authors and performers who transfer their rental rights to record or film producers may be entrusted to collecting societies, which in fact seems the only sensible way in which these rights may be made effective for their owners. Under current UK law, however, the possibility of abuse of power by a collecting society in respect of rental is controlled by the ability of the Secretary of State for Trade and Industry to order that rental to the public is to be treated as licensed at a reasonable royalty to be determined by the Copyright Tribunal. Rental right may also be linked with the 'public lending right' established in the UK by legislation in 1979, under which authors receive payments from a government-controlled fund in respect of any of their books lent to the public by local library authorities. Public lending right is not part of copyright, and its administration is in the hands of government rather than a collecting society; but with the expansion of rental right beyond the neighbouring right works, this may not remain the case.

Another development which has not yet taken place in the UK, although it has elsewhere in the EU, notably France and Germany, is the levy on blank audio (and perhaps video?) tapes. There has been a strong campaign from record producers to establish the levy in the UK, but the government, after seeming persuaded, decided against its introduction under the 1988 Act. The European Commission appears to favour a blank tape levy, which would in effect be a means by which producers could collect a royalty in respect of the use of blank tapes to record copyright works. There are immense difficulties in the administration of such a scheme, not least in determining which producers should collect how much, and how to make allowance for non-infringing uses of tapes (Stewart 1989: 422), and these are probably best overcome through a collective scheme. It is worth noting however that the High Court of Australia has recently held a blank tape levy introduced under the Copyright Amendment Act 1989 to be an unconstitutional tax, refusing to recognise it as any form of licence against a background where private home taping is not an infringement of copyright (*Australian Tape Manufacturers Association Ltd v Commonwealth of Australia* (1994) 25 IIC 290).

This final point invites the speculation that the development of EC law, coupled with the growing importance of the European Court of Justice both as the interpreter of that law and arbiter on conformity of national law to the EU Treaties, will promote centrifugal tendencies, inducing national collection agencies to form cross-border

amalgamations. There have been some developments in this direction in the field of mechanical rights (Montgomery 1994). However, the lesson learned from the tremendous influence of technology on the implementation of performing rights is that of the continuous adaptation of the various interest groups to change if they are to survive economically. It is not entirely in the realm of fantasy to envisage that, in the course of the next century, technology will allow copyright owners to communicate much more directly with those who wish to perform their works and even to see the costs of detecting piracy considerably reduced. Composers' combined action would then be largely confined to seeking ways of minimizing the legal costs of enforcement; as usual, lawyers, at least, would remain in business! Fortunately for us, exploring this scenario would take us far beyond the scope of this contribution.

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